

## **Chapter 4a**

### **Free Market Protection and Privatization Board Act**

#### **Part 1**

#### **General Provisions**

#### **63I-4a-101 Title.**

- (1) This chapter is known as the "Free Market Protection and Privatization Board Act."
- (2) This part is known as "General Provisions."

Renumbered and Amended by Chapter 325, 2013 General Session

#### **63I-4a-102 Definitions.**

- (1)
  - (a) "Activity" means to provide a good or service.
  - (b) "Activity" includes to:
    - (i) manufacture a good or service;
    - (ii) process a good or service;
    - (iii) sell a good or service;
    - (iv) offer for sale a good or service;
    - (v) rent a good or service;
    - (vi) lease a good or service;
    - (vii) deliver a good or service;
    - (viii) distribute a good or service; or
    - (ix) advertise a good or service.
- (2)
  - (a) Except as provided in Subsection (2)(b), "agency" means:
    - (i) the state; or
    - (ii) an entity of the state including a department, office, division, authority, commission, or board.
  - (b) "Agency" does not include:
    - (i) the Legislature;
    - (ii) an entity or agency of the Legislature;
    - (iii) the state auditor;
    - (iv) the state treasurer;
    - (v) the Office of the Attorney General;
    - (vi) the Utah Dairy Commission created in Section 4-22-2;
    - (vii) the Heber Valley Historic Railroad Authority created in Section 63H-4-102;
    - (viii) the Utah State Railroad Museum Authority created in Section 63H-5-102;
    - (ix) the Utah Housing Corporation created in Section 63H-8-201;
    - (x) the Utah State Fair Corporation created in Section 63H-6-103;
    - (xi) the Workers' Compensation Fund created in Section 31A-33-102;
    - (xii) the Utah State Retirement Office created in Section 49-11-201;
    - (xiii) a charter school chartered by the State Charter School Board or a board of trustees of a higher education institution under Title 53A, Chapter 1a, Part 5, The Utah Charter Schools Act;

- (xiv) the Utah Schools for the Deaf and the Blind created in Title 53A, Chapter 25b, Utah Schools for the Deaf and the Blind;
  - (xv) an institution of higher education as defined in Section 53B-3-102;
  - (xvi) the School and Institutional Trust Lands Administration created in Section 53C-1-201;
  - (xvii) the Utah Communications Authority created in Section 63H-7a-201; or
  - (xviii) the Utah Capital Investment Corporation created in Section 63N-6-301.
- (3) "Agency head" means the chief administrative officer of an agency.
- (4) "Board" means the Free Market Protection and Privatization Board created in Section 63I-4a-202.
- (5) "Commercial activity" means to engage in an activity that can be obtained in whole or in part from a private enterprise.
- (6) "Local entity" means:
- (a) a political subdivision of the state, including a:
    - (i) county;
    - (ii) city;
    - (iii) town;
    - (iv) local school district;
    - (v) local district; or
    - (vi) special service district;
  - (b) an agency of an entity described in this Subsection (6), including a department, office, division, authority, commission, or board; or
  - (c) an entity created by an interlocal cooperative agreement under Title 11, Chapter 13, Interlocal Cooperation Act, between two or more entities described in this Subsection (6).
- (7) "Private enterprise" means a person that engages in an activity for profit.
- (8) "Privatize" means that an activity engaged in by an agency is transferred so that a private enterprise engages in the activity, including a transfer by:
- (a) contract;
  - (b) transfer of property; or
  - (c) another arrangement.
- (9) "Special district" means:
- (a) a local district, as defined in Section 17B-1-102;
  - (b) a special service district, as defined in Section 17D-1-102; or
  - (c) a conservation district, as defined in Section 17D-3-102.

Amended by Chapter 223, 2015 General Session

Amended by Chapter 226, 2015 General Session

Amended by Chapter 283, 2015 General Session

Amended by Chapter 411, 2015 General Session

## **Part 2**

### **Free Market Protection and Privatization Board**

#### **63I-4a-201 Title.**

This part is known as "Free Market Protection and Privatization Board."

Enacted by Chapter 325, 2013 General Session

**63I-4a-202 Free Market Protection and Privatization Board -- Created -- Membership -- Operations -- Expenses.**

- (1)
  - (a) There is created the Free Market Protection and Privatization Board composed of 17 members.
  - (b) The governor shall appoint board members as follows:
    - (i) two senators, one each from the majority and minority political parties, from names recommended by the president of the Senate;
    - (ii) two representatives, one each from the majority and minority political parties, from names recommended by the speaker of the House of Representatives;
    - (iii) two members representing public employees, from names recommended by the largest public employees' association;
    - (iv) one member from state management;
    - (v) seven members from the private business community;
    - (vi) one member representing the Utah League of Cities and Towns from names recommended by the Utah League of Cities and Towns;
    - (vii) one member representing the Utah Association of Counties from names recommended by the Utah Association of Counties; and
    - (viii) one member representing the Utah Association of Special Districts, from names recommended by the Utah Association of Special Districts.
- (2)
  - (a) Except as provided in Subsection (2)(b), a board member shall serve a two-year term.
  - (b) Notwithstanding the requirements of Subsection (2)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every year.
- (3)
  - (a) A board member shall hold office until the board member's successor is appointed and qualified.
  - (b) When a vacancy occurs in the membership for any reason, a replacement shall be appointed for the unexpired term.
  - (c) Nine members of the board constitute a quorum.
  - (d) The vote of a majority of board members voting when a quorum is present is necessary for the board to act.
- (4)
  - (a) The board shall select one of the members to serve as chair of the board.
  - (b) A chair shall serve as chair for a term of one-year, and may be selected as chair for more than one term.
- (5) The Governor's Office of Management and Budget shall staff the board. The board may contract for additional staff from the private sector under Section 63I-4a-204.
- (6) The board shall meet:
  - (a) at least quarterly; and
  - (b) as necessary to conduct its business, as called by the chair.
- (7)
  - (a) A member who is not a legislator may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses as allowed in:
    - (i) Section 63A-3-106;
    - (ii) Section 63A-3-107; and

- (iii) rules made by the Division of Finance according to Sections 63A-3-106 and 63A-3-107.
- (b) Compensation and expenses of a member who is a legislator are governed by Section 36-2-2 and Legislative Joint Rules, Title 5, Legislative Compensation and Expenses.

Amended by Chapter 189, 2014 General Session

Amended by Chapter 387, 2014 General Session

**63I-4a-203 Free Market Protection and Privatization Board -- Duties.**

- (1) The board shall:
  - (a) determine whether an activity provided by an agency could be privatized to provide the same types and quality of a good or service that would result in cost savings;
  - (b) review privatization of an activity at the request of:
    - (i) an agency; or
    - (ii) a private enterprise;
  - (c) review issues concerning agency competition with one or more private enterprises to determine:
    - (i) whether privatization:
      - (A) would be feasible;
      - (B) would result in cost savings; and
      - (C) would result in equal or better quality of a good or service; and
    - (ii) ways to eliminate any unfair competition with a private enterprise;
  - (d) recommend privatization to an agency if a proposed privatization is demonstrated to provide a more cost efficient and effective manner of providing a good or service, taking into account:
    - (i) the scope of providing the good or service;
    - (ii) whether cost savings will be realized;
    - (iii) whether quality will be improved;
    - (iv) the impact on risk management;
    - (v) the impact on timeliness;
    - (vi) the ability to accommodate fluctuating demand;
    - (vii) the ability to access outside expertise;
    - (viii) the impact on oversight;
    - (ix) the ability to develop sound policy and implement best practices; and
    - (x) legal and practical impediments to privatization;
  - (e) comply with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, in making rules establishing privatization standards, procedures, and requirements;
  - (f) in fulfilling the duties described in this Subsection (1), consult with, maintain communication with, and access information from:
    - (i) other entities promoting privatization; and
    - (ii) managers and employees in the public sector;
  - (g) comply with Part 3, Commercial Activities Inventory and Review; and
  - (h)
    - (i) prepare an annual report for each calendar year that contains:
      - (A) information about the board's activities;
      - (B) recommendations on privatizing an activity provided by an agency; and
      - (C) the status of the inventory created under Part 3, Commercial Activities Inventory and Review;
    - (ii) submit the annual report to the Legislature and the governor by no later than January 15 immediately following the calendar year for which the report is made; and

- (iii) submit, before November 1, an annual written report to the Government Operations Interim Committee.
- (2)
  - (a) The board may, using the criteria described in Subsection (1), consider whether to recommend privatization of an activity provided by an agency or a local entity:
    - (i) on the board's own initiative;
    - (ii) upon request by an agency or a local entity;
    - (iii) in response to a complaint that an agency or a local entity is engaging in unfair competition with a private enterprise; or
    - (iv) in light of a proposal made by any person, regardless of whether the proposal was solicited.
  - (b) The board may, using the criteria described in Subsection (1), consider whether to recommend privatization of an activity provided by an entity that is an exempted agency under Subsection 63I-4a-102(2)(b) if the entity requests that the board review privatization of the activity provided by the entity.
- (3) In addition to filing a copy of recommendations for privatization with an agency head, the board shall file a copy of its recommendations for privatization with:
  - (a) the governor's office; and
  - (b) the Office of Legislative Fiscal Analyst for submission to the relevant legislative appropriation subcommittee.
- (4)
  - (a) The board may appoint advisory groups to conduct studies, research, or analyses, and make reports and recommendations with respect to a matter within the jurisdiction of the board.
  - (b) At least one member of the board shall serve on each advisory group.
- (5)
  - (a) Subject to Subsection (5)(b), this chapter does not preclude an agency from privatizing the provision of a good or service independent of the board.
  - (b) If an agency privatizes the provision of a good or service, the agency shall include as part of the contract that privatizes the provision of the good or service that any contractor assumes all liability to provide the good or service.

Amended by Chapter 182, 2016 General Session

**63I-4a-204 Staff support -- Assistance to an agency or local entity.**

- (1) The board may, within funds appropriated by the Legislature for this purpose, issue a request for proposals to contract with a private sector person or entity to:
  - (a) provide staff support to the board;
  - (b) assist the board in conducting its duties, including completing the inventory described in Part 3, Commercial Activities Inventory and Review; and
  - (c) at the board's direction, assist an agency or a local entity to:
    - (i) develop a business case for potential privatization of an activity, using the criteria described in Subsection 63I-4a-203(1);
    - (ii) draft, issue, or evaluate a request for proposals to privatize an activity; or
    - (iii) award a contract to privatize an activity.
- (2) The private sector person described in Subsection (1):
  - (a) may not be an advocate for or against privatization; and
  - (b) shall be neutral on the issue of privatization.

Enacted by Chapter 325, 2013 General Session

**63I-4a-205 Board accounting method.**

The board by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall establish an accounting method that:

- (1) is similar to generally accepted accounting principles used by a private enterprise;
- (2) allows an agency to identify the total actual cost of engaging in a commercial activity in a manner similar to how a private enterprise identifies the total actual cost to the private enterprise, including the following:
  - (a) a labor expense, including:
    - (i) compensation and benefits;
    - (ii) a cost of training;
    - (iii) a cost of paying overtime;
    - (iv) a cost of supervising labor; or
    - (v) another personnel expense;
  - (b) an operating cost, including:
    - (i) vehicle maintenance and repair;
    - (ii) a marketing, advertising, or other sales expense;
    - (iii) an office expense;
    - (iv) a cost of an accounting operation, including billing;
    - (v) an insurance expense;
    - (vi) a real estate or equipment cost;
    - (vii) a debt service cost; or
    - (viii) a proportionate amount of other overhead or of a capital expense, such as vehicle depreciation and depreciation of other fixed assets;
  - (c) a contract management cost; and
  - (d) another cost particular to a person supplying the good or service; and
- (3) provides a process to estimate the taxes an agency would pay related to engaging in a commercial activity if the agency were required to pay federal, state, and local taxes to the same extent as a private enterprise engaging in the commercial activity.

Renumbered and Amended by Chapter 325, 2013 General Session

**Part 3**  
**Commercial Activities Inventory and Review**

**63I-4a-301 Title.**

This part is known as "Commercial Activities Inventory and Review."

Enacted by Chapter 325, 2013 General Session

**63I-4a-302 Board to create inventory.**

At least every two years, the board shall compile and make available to the public, by electronic means, an updated inventory of activities of the agencies in the state to classify whether each activity is:

- (1) a commercial activity; or
- (2) an inherently governmental activity.

Renumbered and Amended by Chapter 325, 2013 General Session

**63I-4a-303 Governor to require review of commercial activities.**

The governor may:

- (1) select one or more commercial activities that are being performed by an agency for examination; and
- (2) require the Governor's Office of Management and Budget to conduct the examination and make the determinations and recommendations described in Subsections 63I-4a-203(1)(a), (c), and (d).

Amended by Chapter 310, 2013 General Session

Renumbered and Amended by Chapter 325, 2013 General Session

**63I-4a-304 Duties of the Governor's Office of Management and Budget.**

- (1) The Governor's Office of Management and Budget shall:
  - (a) determine the amount of an appropriation that is no longer needed by an executive branch agency because all or a portion of the agency's provision of a good or service is privatized; and
  - (b) adjust the governor's budget recommendations to reflect the amount determined under Subsection (1)(a).
- (2) The Governor's Office of Management and Budget shall report its findings to the Legislature.
- (3) This section does not prevent the governor from recommending in a budget recommendation the restoration of a portion of the appropriation to an agency that is reduced under this section.

Renumbered and Amended by Chapter 325, 2013 General Session

## **Part 4 Miscellaneous Provisions**

**63I-4a-401 Title.**

This part is known as "Miscellaneous Provisions."

Enacted by Chapter 325, 2013 General Session

**63I-4a-402 Government immunity.**

- (1) This chapter or the inclusion of an activity on an inventory made under this chapter may not be construed as a waiver of any right, claim, or defense of immunity that an agency may have under Title 63G, Chapter 7, Governmental Immunity Act of Utah, or other law.
- (2) The inclusion in an inventory of an activity as a commercial activity for purposes of this chapter may not be construed to find that the activity does not constitute an exercise of a governmental function.

Renumbered and Amended by Chapter 325, 2013 General Session

